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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, *et al.*,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF COUNCIL FOR SECULAR HUMANISM AND INTERNATIONAL ACADEMY OF HUMANISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RONALD A. LINDSAY *
815 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20006-4004
(202) 463-2400

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

- Whether the Establishment Clause prohibits the government from prominently displaying religious texts such as the Ten Commandments in courthouses.

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INTEREST OF THE *AMICI CURIAE*[1]

The Council for Secular Humanism is a non-profit educational organization headquartered in Amherst, New York. The Council engages in a variety of activities that are designed to support institutions, principles, and values that are consistent with a secular worldview, including democracy, respect for human rights, reliance on reason instead of

[1] The Council and the Academy file this brief with the consent of the parties, and letters evidencing such consent have been filed with the Court. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than the amici has made a monetary contribution to this brief's preparation or submission.

the supernatural, and freedom of inquiry. Among other activities, the Council publishes the journal *Free Inquiry*. The Council has participated as an amicus in other cases involving civil liberties, including *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301 (2004) and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

The International Academy of Humanism is an affiliate of the Council established to draw on the resources of various distinguished writers, academics, politicians and scientists (including Nobel laureates) in disseminating humanistic ideals and beliefs. Members of the Academy are committed to free inquiry in all fields of human endeavor, the use of the scientific method, and support of humanist values and principles, including freedom of speech and religion and the dignity of the individual. The Secretariat of the International Academy of Humanism consists of Vern Bullough, professor of history, California State University; Antony Flew, professor emeritus of philosophy, Reading University; Paul Kurtz, professor emeritus of philosophy, SUNY at Buffalo; Gerald Larue, professor emeritus of archaeology and biblical studies, University of Southern California at Los Angeles; and Jean-Claude Pecker, professor of astrophysics, College de France, Academie des Sciences. A complete listing of the members of the Academy may be found at www.secularhumanism.org/academy. The Academy previously participated as an amicus in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

SUMMARY OF ARGUMENT

Petitioners' courthouse displays of the Ten Commandments use undeniably religious texts to advance an unmistakable religious goal, namely to convince all those entering the courthouses that the laws applied therein are and should be based on the religious doctrine of a particular faith. It would be difficult to imagine a more vivid example of an Establishment Clause violation.

Not unexpectedly, petitioners attempt to mask their religious intent by contriving a secular purpose for the displays. But "no . . . recitation of a supposed secular purpose can blind one" to the inherently religious nature of the displays. *Stone v. Graham*, 449 U.S. 39, 41 (1980). Moreover, petitioners' asserted secular purpose does not withstand scrutiny. Petitioners contend that the displays serve to inform the public that the Ten Commandments provide the foundation for American Law. This claimed connection lacks any historical warrant.

That petitioners' avowed secular purpose reflects religious faith, not fact, is shown by the fallacious reasoning which leads them from the unremarkable observation that there are American laws prohibiting theft, perjury and unjustifiable homicide to the conclusion that these laws are necessarily derived from the Decalogue. History, sociology and common sense demonstrate otherwise. Every human community—including communities that had no contact with the ancient Hebrews—has had moral or legal prohibitions against murder, theft and deceit. Sissela Bok, *Common Values* (1995); H. L. A. Hart, *The Concept of Law* (1961). Consistency between American law and some of the prohibitions set forth in the Ten Commandments (at least as they are interpreted by petitioners) does not suffice to establish a causal relationship.

The absence of a causal relationship becomes even clearer when one distinguishes between petitioners' sanitized version of the Ten Commandments and the original understanding of the Ten Commandments. It is the contemporaneous understanding of the Ten Commandments at the time of their promulgation—that is, the understanding that Moses had of them—that fixes their true meaning. *Myers v. United States*, 272 U.S. 52, 175 (1926) (contemporaneous exposition of the Constitution by founders of our government fixes its meaning). The same books of the Bible that provide petitioners the Decalogue demonstrate that Moses did not regard

commandments such as "Thou shalt not kill" and "Thou shalt not steal" as prohibiting the killing and the dispossession of humans who did not share his religious views. *Exodus* 23: 23-30, 32: 25-29; *Deuteronomy* 7: 1-2. *See also Numbers* 31: 6-18. By contrast, American law has never allowed persons with unorthodox religious views to be deprived of their property or killed with impunity. In substituting their more congenial interpretation of the Ten Commandments for the original understanding of the Ten Commandments, petitioners are engaging in an ambitious revision of the Old Testament that Orwell's Big Brother would envy.

A similar disregard for both history and logic is manifested by petitioners' claim that the fact that some of the early colonists modeled some of their laws on the religious edicts in the Decalogue implies that American law is founded on the Decalogue. Petitioners want this Court to ignore the distinction between colonial law and American law, and to pretend that the Constitution and the Bill of Rights do not exist. The founding generation found the misguided efforts of some colonists to impose religious uniformity abhorrent, and these sentiments "found expression in the First Amendment." *Everson v. Board of Education*, 330 U.S. 1, 11 (1947). To the extent the founders used the religious edicts of Ten Commandments as an example, they were used as an example of what *not* to enact into law.

In short, to sustain petitioners' claim that the displays have a secular purpose, this Court must pretend that Jews and Christians are the only persons who have ever rejected theft, murder and deceit, that Moses is not a reliable guide as to how the Ten Commandments should be interpreted, and that America's founding generation embraced, rather than rejected, attempts by some colonists to oppress religious minorities. The Establishment Clause cannot be circumvented by inventing an alternative universe.

ARGUMENT

I. PETITIONERS' DISPLAYS OF THE TEN COMMANDMENTS USE THE GOVERNMENT TO IMPART RELIGIOUS DOCTRINE

The "central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Prominently displaying texts sacred to a particular religion or religions in courthouses or schools unambiguously informs the observer that the government favors certain beliefs. Such conduct by the government is impermissible under the Establishment Clause. *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) (the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief").

This Court's prior decision in *Stone v. Graham*, 449 U.S. 39, 41 (1980), grounds any analysis of the constitutionality of the challenged displays. Stating the obvious, this Court observed that the "Ten Commandments are undeniably a sacred text in both the Jewish and Christian faiths and no . . . recitation of a supposed secular purpose can blind us to that fact." In the instant case, the U.S. Court of Appeals for the Sixth Circuit was not blinded to the religious character of the Ten Commandments. Accordingly, it correctly determined that the Ten Commandments displays serve primarily a religious purpose and are, therefore, unconstitutional. *ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 453-54 (6th Cir. 2003).

A. Petitioners' Asserted Secular Purpose Reflects Religious Faith, Not Historical Fact

Of course, petitioners insist that the displays serve a secular purpose. They locate this purpose in the purported educational value of the displays. Petitioners' Brief at 9 (purpose of the displays is to "educate the public"). What they hope to

instruct the public on is the supposed truth of the claim that the Ten Commandments provide the "moral background" of the Declaration of Independence and the foundation of the American legal tradition. *McCreary County,* 354 F.3d at 454.

Curiously, however, despite petitioners' decision to predicate their avowed secular purpose on the educational value of the exhibit, petitioners are resistant to having the courts examine the factual basis for their claim that the Ten Commandments are the foundation of American law. Petitioners assert in their brief that the historical accuracy of the claimed connection between the Ten Commandments and American law is not at issue because the display could serve a secular purpose even if the claimed connection did not exist. Petitioners' Brief at 10-11. They state: "Petitioners' purpose is not to debate historians but to post a Display about law." *Id.* Petitioners' point is not well-taken. To maintain the displays are "about law" is mere question-begging unless the purported connection between the Ten Commandments and American law can be established. Petitioners' contention that this Court should not examine the accuracy of their claim betrays a seriously flawed understanding of this Court's Establishment Clause jurisprudence. Clearly, one way to distinguish a sham from a valid purpose is to determine whether the purported justification is based on faith or facts. Religious tenets cannot be forced on the public by masquerading them as science. *Edwards v. Aguillard,* 482 U.S. 578 (1987). Similarly, religious tenets cannot be forced on the public by masquerading them as historical fact.

Furthermore, as a matter of logic, petitioners' claims about history invite and require scrutiny. Petitioners have tried to fit a undeniably religious text into a secular mold by maintaining there is a critical, foundational connection between this religious text and secular law. They cannot simultaneously try to insulate this alleged connection from review by telling this Court it is none of its business whether there is historical

support for this connection. One could not justify posting Mormon tracts and texts in courthouses by the simple expedient of contending that the Book of Mormon is the foundation of American law. The Establishment Clause cannot be so easily circumvented.

This Court is no stranger to historical analysis. *See, e. g., Crawford v. Washington,* 541 U. S. 36, 124 S.Ct. 1354 (2004) (extensive historical analysis of origins of Confrontation Clause). Indeed this court has relied on its reading of history both to validate practices otherwise susceptible to an Establishment Clause challenge and to support a conclusion that a practice violates the Establishment Clause. *E.g., Marsh v. Chambers,* 463 U.S. 783, 790 (1983) (historical evidence critical for determining that legislative chaplaincies are constitutional); *Edwards v. Aguillard,* 482 U. S. at 590 (history of opposition to theory of evolution by various religious denominations relevant for determining whether statute has a predominantly religious purpose). Granted, there are historical claims that are difficult to resolve (for example: a conflict substantially similar to the Trojan War depicted in Homer actually took place), but there are also many historical facts that should be accepted by all reasonable individuals, even if there is some speculation to the contrary (for example: the Egyptian pyramids were built by human beings.) As shown below, petitioners' claim that the Ten Commandments is the foundation of our legal tradition cannot withstand a reasoned analysis. Indeed, it is not too strong to say this claim represents a gross distortion of history. With this pretext for the displays removed, petitioners' argument that the displays serve a secular purpose collapses.

In undertaking an historical analysis of the role played by the Ten Commandments in the American legal system, one must be careful to avoid mistakes that are all too evident in petitioners' arguments. Four errors in particular render petitioners' historical discussion useless as a guide for this Court.

First, one cannot prove an historical connection simply by quoting individuals, however distinguished, who assert there is such a connection. *Cf.* Petitioners' Brief at 11 n. 8. One must examine the facts upon which these individuals base their assertions. Second, it is a logical and sociological fallacy to assert that the Ten Commandments served as an actual model or exemplar for American law merely because the current understanding of some of the commandments is consistent with various American laws. Prohibitions of theft, deceit and unjustified homicide are found in every culture, past and present. Third, to establish that the Ten Commandments provide the foundation for American law, precision about the proper interpretation of the Ten Commandments is indispensable. Plaintiffs fail to consider the striking differences between the current understanding of the Ten Commandments within their religion and the contemporaneous interpretation of the Decalogue by Moses. Obviously, the manner in which Moses interpreted the Decalogue is critical for fixing its true meaning and for determining what influence, if any, the Decalogue had on American law. *See Myers v. United States,* 272 U.S. 52, 175 (1926) (contemporaneous exposition of the Constitution by founders of our government fixes its meaning). Finally, one cannot equate the laws of British colonies, some of which, such as Massachusetts, operated for a time as theocratic states, with American law, especially when American law represented, in part, a rejection of these colonial precedents. Once the palpable errors in petitioners' historical discussion are removed, there can be no tenable argument that the Ten Commandments provide the foundation for American law.

B. Petitioners Rely on Unsubstantiated Assertions About the Foundational Role of the Ten Commandments, Which Historical Analysis Proves Mistaken

Petitioners place significant weight on quotations from a number of jurists who have speculated about the role of the Ten Commandments in the development of American law. Petitioners' Brief at 11, 21. For example, petitioners quote Chief Justice Rehnquist's dissent from the denial of certiorari in *City of Elkhart v. Books,* 532 U.S. 1058, 1059 (2001), in which the Chief Justice referred to the "foundational role of the Ten Commandments in secular, legal matters." *Id.* at 1062. However, the Chief Justice cited no authority to support this claim. In the Chief Justice's prior dissent in *Stone v. Graham,* 449 U. S. at 43-47, the Chief Justice did cite to the opinion of the U. S. Court of Appeals for the Tenth Circuit in *Anderson v. Salt Lake City Corp.,* 475 F.2d 29, 33 (10th Cir. 1973), as support for a similar proposition. However, a review of *Anderson* itself indicates that the Tenth Circuit used as sole evidence for its conclusion about the secular importance of the Ten Commandments the vague remark of one of the *Anderson* plaintiffs that "'the Ten Commandments is an affirmation of at least a precedent legal code.'" 475 F.2d at 33. That the Ten Commandments are, in some sense, a portion of a proto-legal code is not in dispute. What is disputed is whether the Ten Commandments provide the foundation for the American legal system. Tracing the Chief Justice's observations back to their apparent source reveals that, while they were undoubtedly motivated by a desire for accuracy, they lack adequate and reliable support.

A similar analysis could be carried out on all the various observations and remarks quoted by petitioners. Opinions of this Court and other American courts, especially those dating to a time prior to the development of modern Establishment Clause jurisprudence, provide fertile ground for offhand

observations about the importance of the Ten Commandments, the Bible or Christianity to the development of the law. It is, for example, notoriously true that this Court once declared, more than a century ago, that the United States "is a Christian nation." *Church of the Holy Trinity v. United States*, 143 U. S. 457, 471 (1892). However, none of these opinions provides anything resembling a careful historical analysis of the role of the Ten Commandments, the Bible or Christianity in the development of American law, instead relying principally, if not exclusively, on what prior judicial decisions said about the importance of the Ten Commandments, the Bible or Christianity. Essentially, the various quotations on which petitioners rely amount to nothing more than an judicial chain-letter extended over dozens of decades in which one jurist relies on another jurist's comments as authority for a dubious proposition, without anyone ever bothering to examine the underlying factual support for this proposition. Repeating an opinion does not convert it into reality. As one jurist has noted, "no amount of repetition of historical errors in judicial opinions can make the errors true." *Wallace v. Jaffree,* 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting). Establishment Clause jurisprudence should not be erected on a house of cards.

Fortunately, there has been some historical analysis of the claim advanced by petitioners, and that analysis establishes that "[t]he historical record fails to support claims of a direct relationship between the law and the Ten Commandments." Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law,* 14 J. L. Religion 525, 558 (1999-2000). Professor Green points out that English common law relied primarily on custom, not the Decalogue or the Bible. *Id.* at 532. Moreover, the founders of the *American* government (as distinguished from British colonies) relied on "Enlightenment thinkers such as Locke, Pufendorf and Grotius for inspiration." *Id.* at 544. Other well-respected scholars have reached similar conclusions.

See, e.g., Bernard Bailyn, *The Ideological Origins of the American Revolution* 27 (1967) ("The ideas and writings of the leading *secular* thinkers of the European Enlightenment—reformers and social critics like Voltaire, Rousseau, and Beccaria as well as conservative analysts such as Montesquieu—were quoted everywhere in the colonies, by everyone who claimed a broad awareness.") (emphasis added).[2]

Significantly, petitioners also overlook entirely the contributions of Roman law to both British and American law. This oversight is very relevant to petitioners' claims because Roman law developed independently of Judaism or Christianity.[3] Although the precise extent to which Roman law influenced British and, subsequently, American law remains a matter of controversy, that it had a significant influence does not seem open to question. *See, e. g.*, Richard H. Helmholz, *Canon Law and the Law of England* (1987); Richard H. Helmholz, *Magna Carta and the ius commune,* 66 U. Chi. L. Rev. 297 (1999). Furthermore, a survey of this Court's decisions reveals many instances in which Roman law has been referenced as supplying at least part of the rationale for a decision. *See, e.g., Crawford,* 124 S.Ct. at 1359; *Roe v. Wade,* 410 U.S. 113, 130 (1973); *Van Beeck v. Sabine Towing Co.* 300 U.S. 342, 344-45 (1937); *Cubbins v. Mississippi River Comm'n,* 241 U.S. 351, 363-66 (1916); *Geer v. Connecticut,* 161 U.S. 519 (1895); *Coffin v. United States*, 156 U.S. 432, 450-55 (1895). By contrast, it is not clear whether the Ten Commandments have ever supplied part of the rationale for a decision by this Court.

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[2] Bailyn's book, winner of the Pulitzer and Bancroft prizes, has been previously cited by this Court as an authority on the thoughts and concerns of this nation's founders. *See, e.g., Larkin v. Grendel's Den,* 459 U.S. 116, 127 n. 10 (1982); *Larson v. Valente,* 456 U.S. 228, 244 (1982).

[3] Obviously, after the reign of Constantine, Roman law began to reflect some Christian precepts. But by that time Rome had been a nation for centuries.

C. Consistency with Secular Laws Does Not Prove That the Ten Commandments Are the Source of These Laws

As suggested by arguments in their brief, petitioners would undoubtedly reject this last contention, maintaining that our laws against various forms of theft, unjustified homicide, and perjury mirror and, therefore, can be traced to some of the commands of the Decalogue. Petitioners' Brief at 26-27. Here, petitioners commit an error that is fatal to their historical claims as well as being very revealing about both the purpose and effects of their displays. Petitioners effectively argue that because many laws are consistent with their understanding of the Ten Commandments, that implies these laws are based on the Ten Commandments. This contention truly establishes that petitioners are viewing history through the prism of faith.

All or virtually all human societies have had moral or legal prohibitions against unjustified killing, theft and deceit. "[I]njunctions against violence, deceit and betrayal . . . are familiar in every society and every legal system. They have been voiced in works as different as the Egyptian Book of the Dead, the Icelandic Edda, and the Bhagavad-Gita." Sissela Bok, *Common Values* 15 (1995). Any community in which such minimal rules were lacking would be extremely short-lived. Given human vulnerabilities, some rudimentary principles of cooperation are indispensable. "In every well-functioning society norms are in place to prohibit lying, breaking promises, causing bodily harm, stealing, fraud, the taking of life, the neglect of children and failures to keep contracts." Tom. L. Beauchamp, *A Defense of the Common Morality,* 13 Kennedy Instit. of Ethics Journal 259, 261 (2003). *See also* Peter Singer, *The Expanding Circle* (1981). The leading jurisprudential scholar of the last hundred years stated unequivocally that the law has a certain minimum content. H.L.A. Hart, *The Concept of Law* 189 (1961). There

is a common element in the law of all societies because "any social organization must contain [these rules] if it is to be viable." *Id.* at 188.

From the foregoing, it is readily apparent that the mere consistency between the petitioners' understanding of some of the Ten Commandments (that is, the ones that do not prescribe specifically religious duties) and American laws does *not* establish a causal relationship. Sumerian society, the civilizations of ancient Egypt, China and Greece, Rome, the Inca Empire, etc. all have had laws prohibiting unjustified homicide, theft and materially significant deceit. Furthermore, no society could survive without such rules. In attributing to the Ten Commandments laws that are the common heritage of civilized society, petitioners are attempting to elevate their religion to a special status. They are maintaining that society would dissolve into anarchy were it not for the Ten Commandments. Such a claim is not only historically and sociologically preposterous, but it underscores the transparently religious nature of the displays. Petitioners are not using the displays to educate the public (unless "educate" is synonymous with "misinform"), but to proselytize by suggesting to the public that they must adhere to the Ten Commandments lest society collapse.

Of course, if petitioners could show that the Ten Commandments should be interpreted in a way that distinguishes them from the common content of law found in all societies *and* that these differences provide the foundation of American law, then perhaps some credence could be given to their claim. Arguably, by analyzing the interpretation and application of the Ten Commandments by Moses, they could show the former, but it would be impossible for them to show the latter. The Council and the Academy now turn to an examination of the Ten Commandments as they were interpreted and applied by Moses.

D. The Interpretation Given the Ten Commandments by Moses Would Be Rejected and Condemned by Today's Americans As Well As Americans of the Founding Generation

One cannot cogently argue that X provides the foundation for Y if one is not even clear what X is. Incredibly, petitioners expend virtually no time addressing the content and implications of the Ten Commandments, assuming they are a given. This, of course, reinforces the point that petitioners are advancing their particular religious viewpoint through their displays. Perhaps within petitioners' religious tradition the meaning of the Ten Commandments is clear, but different traditions have interpreted these commandments differently. An abstract prohibition of "killing" does not provide serviceable moral or legal guidance. One must be clear about who is protected by this prohibition. As one perceptive jurist has noted, what counts as an unjustified killing "varies enormously from society to society." Richard A. Posner, *The Problematics of Moral and Legal Theory* 6 (1999).

Insisting that this Court attend to the differences in interpretation of the Ten Commandments is not a mere quibble. Leaving aside the different wording and numbering of the commandments among different religions,[4] there are striking differences between the way in which petitioners appear to interpret the commandments, in particular the ones that do not deal with strictly religious obligations, and the way in which Moses interpreted them. For example, even a cursory review of the Bible, which, of course, is our source for the Decalogue, establishes that Moses did not include all humans within the scope of the commandments "Thou shalt not kill" and "Thou shalt not steal." The commandments were in-

[4] We do not mean to discount the significance of the differences in the numbering and wording of the commandments, but this point has been adequately addressed in other briefs.

tended to govern relations within the community of the ancient Hebrews; they did not protect those living outside the Hebrew community.[5] This contemporaneous construction of the Ten Commandments, that is the Ten Commandments as applied by Moses, fixes their true meaning. *See Myers v. United States,* 272 U.S. at 175 (contemporaneous exposition of the Constitution by founders of our government fixes its meaning). *See also Utah v. Evans,* 536 U. S. 542, 503 (2004) (Thomas, J., dissenting) (same). Once the true meaning of the commandments is fixed by the words and deeds of Moses, any claim that they provide the foundation for American law ceases to be credible.

The Bible reveals that not long after Moses received the Ten Commandments and promulgated them to the ancient Israelites, Moses showed how narrowly the injunction not to kill should be applied. Specifically, after Moses directed the Israelites to attack and slaughter a people known as the Midianites, he was angry when his warriors returned with more captives than he thought necessary. Moses stated:

> Now therefore, kill every male among the little ones, and kill every woman who has known man by lying with him. But all the young girls who have not known man by lying with him, keep alive for yourselves.

Numbers 31: 17-18. An adjacent passage in *Numbers* sheds light on Moses' interpretation of the commandment "Thou shalt not steal." Again, the protections of this commandment

[5] Significantly, the Decalogue is introduced by God's statement that "I am the Lord your God, who brought you out of the land of Egypt, out of the house of bondage." *Exodus* 20:2. This statement makes it clear that the Ten Commandments form part of the covenant between God and the people of Israel.

All quotes from the Bible are from the New Revised Standard Version found in *The New Oxford Annotated Bible* (Herbert G. May and Bruce M. Metzger eds.) (1977).

did not extend to those outside the covenant between the Israelites and their deity:

> And the people of Israel took captive the women of Midian and their little ones; and they took as booty all their cattle, their flocks and all their goods.

Numbers 31: 9.

Indeed, almost immediately after Moses received the commandments from his deity, Moses and the Israelites embarked on a ruthless war of aggression to occupy land already inhabited by other peoples. Moses understood this war to be expressly sanctioned by his deity:

> When my angel goes before you, and brings you in to the Amorites, and the Hittites, and the Perizzites and the Canaanites, the Hivites, and the Jebusites and I blot them out, you shall not bow down to their gods, nor serve them, nor do according to their works, but you shall utterly overthrow them and break their pillars in pieces . . . I will send my terror before you, and will throw into confusion all the people against whom you shall come, and I will make all your enemies turn their backs to you. And I will send hornets before you, which shall drive out Hivite, Canaanite, and Hittite from before you . . . Little by little I will drive them from before you, until you are increased and possess the land.

Exodus 23: 23-30. *See also Deuteronomy* 7: 1-2 (Israelites instructed to show no mercy to the Canaanites, et al. after taking possession of their land). Today, we would undoubtedly consider an unprovoked war with the aim of dispossessing entire groups of people to be a horrible crime; it is what is euphemistically referred to as "ethnic cleansing." Moreover, although the founders of our nation may have lacked some of our sensitivities, there is no record of Washington, Jefferson, Franklin, Madison and others of this generation accepting Moses' conduct as a model for their

personal behavior or the legal relations between the United States and other nations. The Louisiana Territory was purchased by the United States, not stolen from France. When the United States acquired territories from other nations, the property rights of those already in these territories was respected. *United States v. Percheman,* 32 U.S. 51 (1833) (observing that the "sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated" upon the acquisition of foreign territory by the United States).[6]

The circumscribed scope of the commandments affects the interpretation of other prohibitions as well. The commandment not to "bear false witness against your neighbor" necessarily excludes the Canaanite, Hittite, et al. who, despite their geographical proximity, were clearly not regarded as the "neighbors" of the Hebrews. Moreover, the prohibition on adultery did not preclude sexual exploitation of conquered peoples. Moses' instruction to "kill every woman who has known man by lying with him" but to "keep alive for yourselves" the "young girls who have not known man" (*Numbers* 31: 17-18) was not, presumably, a way of selecting women based on their cooking skills.

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[6] Some may contend that the troubled relations between our nation and Native Americans proves that Moses' interpretation of the Ten Commandments did serve as a model for American law. However, although the actions of European explorers and early colonists were often adverse to the interests of Native Americans, the official policy of the United States after its founding as a nation respected the rights of Native Americans (at least in theory). Accepting the earlier conquest as a *fait accompli,* the United States policy thereafter was that Native Americans could be removed from land only through negotiation, not forcible dispossession. *See Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 273-74 (1955) (policy of Congress "throughout our history" has been to extinguish Indian title through negotiation rather than by force).

Even the command to honor one's father and mother is connected with the belief that the Israelites were entitled to take possession of the land of other peoples. The text of this commandment, as found in the Bible, is: "Honor your father and mother, that your days may be long in the land which the Lord your God gives you." *Exodus* 20:12. Petitioners cite no examples of American laws which make discharging obligations to one's parents a condition precedent to the acquisition of real property.

That the Ten Commandments form an inextricable part of the covenant between the Israelites and their deity is also demonstrated by the treatment of Israelites who violated key terms of the covenant, in particular the obligation to worship their deity exclusively. Everyone is familiar with the story of the Israelites who decided to worship a golden calf while Moses was absent. Less familiar is the conclusion of that story, in which Moses, the transmitter of the prohibition not to kill, ordered his loyalists to go "throughout the camp, and slay every man his brother, and every man his companion, and every man his neighbor," with the result that "there fell . . . that day about three thousand men." *Exodus* 32: 27-29.

In pointing out that Moses' interpretation of the Decalogue is starkly distinct from petitioners' apparent interpretation of similar prohibitions, we mean no disrespect to those who venerate Moses as a lawgiver and religious leader. Retrospective moral judgments—especially ones concerning the conduct of individuals who lived millennia ago—are always questionable. The ancient Middle East was not exactly a haven of peace and tranquility and goodwill among all peoples. Among almost all ancient peoples, moral and legal norms protected members of one's own tribe, clan or community; no comparable restraints protected individuals belonging to other groups. So Moses was no worse than any other leader, and in some ways he was more enlightened than many of his time. *Deuteronomy* 23: 15-16; 24: 16-18 (forbidding return of runaway slaves and exploitation of "sojourners," the fatherless, and widows and rejecting the notion of collective responsibility).

Nonetheless, petitioners should not be allowed to pass off their sanitized rendition of the prohibitions set forth in the Ten Commandments as *the* Ten Commandments, and then use this Disney version as a means of government-sponsored religious recruitment. This Court should not countenance such a gross distortion of history as is suggested by petitioners' claim that Moses' Ten Commandments provide the foundation for American law.

E. The New American Nation Repudiated Efforts by Some Colonies to Model Laws on the Decalogue

Petitioners' brief cites various examples of how some of the British colonies in North America arguably modeled some of their legislation on the Ten Commandments. For example, petitioners cite to a 1641 Massachusetts law banning the worship of "any other god but the Lord God" and a similar New Hampshire law from 1680 prohibiting "idolatry." Petitioners' Brief at 23-24. Petitioners are on somewhat more solid footing with this claim as it is historically correct that *some* colonies, especially early Massachusetts, made an explicit attempt to incorporate *some* portions of the Decalogue—in particular the commandments relating to religious practices—into their legal codes. Green, *The Fount of Everything Just and Right* at 536-43. Regrettably, some of the early colonists did desire theocratic instead of democratic government.

However, these attempts to incorporate portions of the Decalogue were abandoned in the 1700's and then decisively rejected by the United States once it became a nation. *Id.* at 542-43 ("Significantly, the failed experiment in Puritan New England, over by the 1690s, would be as close as the nation

would ever come to a legal system based on the Decalogue."). As this Court has observed, the feelings that "found expression in the First Amendment" were feelings of indignation and abhorrence at the efforts of some in the colonies to impose religious uniformity. *Everson v. Board of Education,* 330 U.S. 1, 11 (1947). Moreover, fresh in the minds of the founders was the history of the immediately preceding centuries, which were "filled with turmoil, civil strife and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Id.* at 8-9. It was in this attempt to maintain religious supremacy that laws forbidding "idolatry" were adopted, and it was precisely such intolerant legislation that the Establishment Clause was designed to foreclose. Furthermore, it is no accident that the Constitution itself contains no invocations of or references to deities and expressly forbids any religious test for public office. U.S. Const., art. VI. From the beginning of our existence as a nation, "idolaters" have been free to hold public office.

Therefore, the influence of the Ten Commandments on American law was, in this context, largely negative. One cannot prove that the Ten Commandments constitute "the foundation" of the American legal system by citing examples of colonial religious edicts that were repudiated by the Constitution and the Bill of Rights any more than one can prove that the British monarchy constitutes "the foundation" of America's democracy by the references to the abuses of King George in the Declaration of Independence.

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Proving that an asserted purpose is a sham purpose can be accomplished in several different ways. For example, one can show that the asserted purpose is inconsistent with other statements or contentions made by the party. One can also show that the asserted purpose is nothing more than a post-hoc rationalization. *See Santa Fe Indep. Sch. Dist. v. Doe,*

530 U.S. 290, 315 (2000). Petitioners' avowed secular purpose fails for both of these reasons. *McCreary County*, 354 F.3d at 457. However, one can also show that an asserted purpose is a sham by proving that it is wholly lacking in credibility. Petitioners' claim that their displays serve the secular purpose of educating the public regarding the foundational role of the Ten Commandments for American law asks this Court to pretend that Jews and Christians are the only persons who have ever rejected theft, murder and deceit, that the belligerent actions ascribed to Moses in the Bible must have been carried out by someone impersonating the Moses who promulgated the Ten Commandments, and that America's founding generation embraced, rather than rejected, the misguided efforts of some colonists to oppress religious minorities. A preposterous claim cannot substitute for a genuine secular purpose. Petitioners' displays violate the Establishment Clause.

II. PETITIONERS' DISPLAYS CONSTITUTE AN IMPERMISSIBLE ENDORSEMENT OF A PARTICULAR RELIGIOUS FAITH

The Establishment Clause prohibits the government from sponsoring a religious message, in part "because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Through their inclusion of documents such as the Bill of Rights in their Ten Commandments displays, petitioners manage only to magnify the extent of government endorsement of their religious message. *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000). Indeed, petitioners' sham secular justification for the displays both reveals what they really want to accomplish

and foreshadows what they likely will accomplish if their displays are allowed to remain in the courthouses. Petitioners want to appropriate the symbols of our government and link them with their religious message through the fiction that the Ten Commandments provide the foundation for American law. As already demonstrated, petitioners' claimed historical connection is, to put it charitably, unsupported by a scintilla of credible historical evidence. Yet by using their displays to associate the Bill of Rights and other secular documents with their religious texts, petitioners will surely be able to convince many that their fiction is fact and that their religion does have a special relationship with government. One must grudgingly admit that this is a neat trick if petitioners can pull it off: to use the Bill of Rights to validate a government-sponsored religious message when it was precisely the government sponsorship of religious messages that the Establishment Clause was intended to prevent.

Of course, the placement of these displays in courthouses, "where the government carries out one of its quintessential functions," *McCreary County*, 354 F.3d at 461, similarly intensifies the government's endorsement of petitioners' religious message. This Court has recognized the importance of ensuring equal access to our nation's courthouses. *See Tennessee v. Lane*, 124 S.Ct. 1978 (2004). While petitioners' displays do not serve to bar religious dissenters physically from the courthouses, they serve as a more significant impediment, namely to the possibility of religious dissenters obtaining equal justice in these courthouses. Not only do the displays send a message to all those who do not accept the Ten Commandments as part of their religious beliefs that they are second-class citizens, but they will likely affect the perception of religious dissenters by those who do accept the Ten Commandments. When an atheist witness insists on his right to affirm, rather than swear, how will the religious majority regard his testimony after being informed on a daily

basis throughout the course of a trial that our perjury laws are based on the commands of a deity the atheist does not acknowledge?

The concern that agnostics, humanists and atheists will experience substantial adverse effects from petitioners' displays is not speculative. Prejudice against nontheists has deep roots in this country and courthouse doors have been effectively closed to nonbelievers in the past. Earlier in our history, when the Establishment Clause did not apply to the states, many states did not permit atheists to testify, precisely because they were considered inherently immoral and unworthy of belief. *E.g., Jackson v. Gridley*, 18 Johns. 98 (N.Y. 1820). Some of these prohibitions continued into the 20th Century. *See* Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 Yale L. J. 659, 667-68 (1930). Although official legal burdens on nontheists have been removed, the hostility towards them remains. Indeed, the animosity toward them is still so intense that sociologists routinely study a group's attitudes towards atheists—along with Nazis—as a way of measuring that group's levels of tolerance. Fredric D. Weil, *Tolerance of Free Speech in the United States and West Germany, 1970-79*, 60 Social Forces 973 (1982). *See also* Hugh Whitt and Hart M. Nelsen, *Residence, Moral Traditionalism and Tolerance of Atheists*, 54 Social Forces 328 (1975). Recent surveys confirm that the last respectable prejudice in this country is bigotry toward nontheists. A poll commissioned by the Pew Charitable Trust shows that only 49% of Americans would consider voting for an atheist for president, whereas 95% would vote for an African-American, 92% would vote for a woman, 92% for a Jewish candidate and 59% for a homosexual. Public Agenda, *For Goodness' Sake: Why So Many Americans Want Religion to Play a Greater Role in American Life*, 37-38 (2001).

The primary source of this hostility is the common belief that morality must be based on God's commands, with the consequence that many view atheists and other religious skeptics as incapable of moral behavior. *See Kurtz v. Baker*, 644 F. Supp. 613, 615, 623 (D.D.C. 1986) (discussing prayers offered by Senate Chaplain Halverson, which asserted, *inter alia,* that the godless have no concern for human rights). *See also* Cong. Rec. H 1209 (daily ed. March 6, 1984) (remarks of Rep. Siljander) (asserting that humanists have no morality because they do not believe in God and, therefore, approve of the rape of young girls).[7] By falsely proclaiming that belief in God is essential to the rule of law, petitioners' displays serve to strengthen and inculcate this prejudice.

The notion that moral and legal norms should protect all humans, instead of merely those within one's tribal, religious or national community, is a fairly recent development in human history, as the previous discussion of the Old Testament illustrates. See Singer, *The Expanding Circle* 50-51, 111-13. Many would credit the European Enlightenment for the broad acceptance of the view that there are *human* rights, and that all humans should fall within the scope of our moral and legal norms. *Id.* at 114. Whatever the explanation, it is fortunately true that respect for the lives, liberty and property of others is a sentiment that now is not usually confined to one's own religious or ethnic group. What inspires a person to accept the universality of ethics and the law is not important. To the extent the Ten Commandments inspire individuals to embrace appropriate moral ideals, they are to be welcomed, just as the Sermon on the Mount, the Koran, the Bhagavad-Gita, the Analects of Confucius, the wisdom of Buddha and the moral philosophy of John Locke, David Hume or Immanuel Kant should be welcomed when they inspire individuals to treat others with appropriate respect and

[7] *Cf. Numbers* 31:17-18 (discussing how Moses dealt with young female captives).

consideration. But to proclaim that the Ten Commandments provide *the* foundation for our morality and law is not only irreconcilable with history, but it also threatens to take us back to an era when norms were less inclusive - - when the atheist, the Hindu, the Muslim and other "outsiders" were not considered part of the moral community, and could be treated accordingly. The Court should not allow the government to give a privileged position to petitioners' religious views.

CONCLUSION

For all the foregoing reasons, the Court should affirm the judgment of the U.S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RONALD A. LINDSAY *
815 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20006-4004
(202) 463-2400

* Counsel of Record

Counsel for Amici Curiae